RECORD AND BRIEFS

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In The

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Michigan passed both private-sector and public-sector right-to-work legislation in December 2012 and is still in the process of severing the link between exclusive representation and mandatory agency fees since some collective bargaining agreements were grandfathered into the state's right-to-work law and have not yet expired. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws.

SUMMARY OF ARGUMENT

This Court upheld the constitutionality of agency fees for public-sector workers in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The issue presented by Petitioner is "should *Abood* be overruled and

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. The parties were given ten days' notice of the filing of this brief.

public-sector agency fee arrangements declared unconstitutional under the First Amendment?" This dispute arose in last term's *Friedrichs v. California Teachers Association*, ___ U.S. ___, 136 S. Ct. 1083 (2016), and this Court split 4-4. Amicus Mackinac Center filed a brief at both the certiorari and merits stages there.[2] These briefs were focused on the question raised in *Harris v. Quinn*, ___ U.S. ___, 134 S. Ct. 2618 (2014) – whether public-sector exclusive bargaining agents would survive without agency fees. Both briefs looked at data from the Bureau of Labor Statistics' Current Population Survey (CPS) to calculate the union membership rate among workers covered by a collective bargaining agreement.[3]

This brief uses another method in an effort to assess the reliability of the CPS figures: it establishes a union membership "floor" by examining the number of state employees who have union dues withdrawn from their paycheck. In most cases, the figures were obtained by contacting payroll officers in each state and asking them the total number of state employees, employees covered by collective bargaining agreements,

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[2] The certiorari brief appears at http://www.scotusblog.com/wp-content/uploads/2015/10/Mackinac-Cert-Stage-Amicus-Friedrichs-v.-CTA.pdf; the merits brief, at http://www.scotusblog.com/wp-content/uploads/2015/10/14-915-tsac-Mackinac-Ctr.pdf.

[3] The membership rate is the number of union members covered by a collective bargaining agreement divided by the number of workers – both union members and nonmembers – covered by the agreement.

and employees paying dues through paycheck withdrawal. Full results were obtained from 46 states and partial results from the remaining four.[4]

This alternative methodology, the "payroll deduction methodology," does raise concerns about certain subsets of the CPS data. It does not, however, affect the answer to the question presented in this case. These new data do not indicate that agency fees are necessary to preserve the state interest in maintaining a mandatory bargaining partner.

ARGUMENT

I. There is no empirical evidence that exclusive representation in the public-sector is dependent on agency fees.

A. *Harris v. Quinn* and state-interest arguments for agency fees

In *Harris v. Quinn*, this Court held that Illinois could not "compel personal care providers to subsidize speech on matters of public concern by a union that they [did] not wish to join or support." *Harris*, 134 S. Ct. at 2623. This Court also questioned *Abood*'s

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[4] These results will also be published later this year in an article for the University of Chicago Legal Forum. Patrick J. Wright, *Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey's Public-Sector Unionism Data Sufficiently Reliable*, U. Chi. Legal F. (forthcoming November 2017).

holding that agency fees are constitutional in public-sector bargaining.

The five-member *Harris* majority identified three potential benefits related to the exclusive representation: (1) "prevent[ing] inter-union rivalries from creating dissension within the work force"; (2) "avoid[ing] the confusion that would result from [the government employer's] attempting to enforce two or more agreements specifying different terms and conditions of employment"; and (3) "free[ing] the employer from the possibility of facing conflicting demand from different unions, and permit[ting] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.* at 2631 (internal citations omitted).

Yet the majority also stated that a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* at 2640. *Abood*'s decision to the contrary was said to rest "on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 134 S. Ct. at 2634. Noting that this First Amendment question required "exacting scrutiny," the *Harris* majority indicated a union must show that it could not have achieved a bargaining result if it "had been required to depend for funding on the dues paid by those [covered employees] who chose to join." *Id.* at 2641.

The four-member *Harris* minority justified public-sector agency fees by asserting the state had a compelling interest that was dependent upon such fees. The state interest was described four times in slightly different ways. The first was "negotiating with an equitably and adequately funded exclusive bargaining agent over terms and conditions of employment." *Harris*, 134 S. Ct. at 2647 (Kagan, J., dissenting). The second was "bargaining with an adequately funded exclusive bargaining representative." *Id.* at 2656. The third was, "It ensures that a union will receive adequate funding . . . so that a government wishing to bargain with an exclusive representative will have a viable counterpart." *Id.* Finally, the fourth was in claiming that the majority had denied Illinois what "it reasonably deemed appropriate to effectuate [mandatory bargaining for personal care providers] – a fair-share provision ensuring that the union [had] the funds necessary to carry out its responsibilities." *Id.* at 2657. The dissenters argued that because the "legally imposed disability" of the duty of fair representation prevented a union from giving "any special advantages to its own backers," agency fees were justified. *Id.* at 2656.

The majority had pointed to federal employee unions to make the point that unions could survive in a right-to-work environment. *Id.* at 2640. The dissent countered by claiming that "union supporters (no less than union detractors) have an economic incentive to free ride." *Id.* at 2657 (Kagan, J., dissenting). Noting that only one out of three federal employees covered by

a collective bargaining agreement pay dues, *id.* n. 7, the dissenters questioned rhetorically:

> And why, after all, should that endemic free-riding be surprising? Does the majority think that public employees are immune from basic principles of economics? If not, the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions.

Id. at 2657.

B. The CPS methodology for examining union membership in right-to-work environments

In *Friedrichs*, amicus Mackinac Center used data from the federal CPS to examine the effect of right-to-work environments on union membership rates.

According to the Bureau of Labor Statistics: "The data on union membership are collected as part of the CPS, a monthly sample survey of about 60,000 eligible households that obtains information on employment and unemployment among the nation's civilian noninstitutional population ages 16 and over."[5]

In *Friedrichs*, amicus Mackinac Center tested the hypothesis of the *Harris* dissenters by reviewing the membership rates of those unions that possessed both

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[5] Bureau of Labor Statistics, Economic News Release (Jan. 26, 2017), http://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/9X2H-UGEE].

the power of exclusive representation and the duty of fair representation. Holding these constant generally allowed us to isolate the effect of right-to-work laws versus agency fee laws on union membership rates.[6]

To achieve this comparison, we focused on private-sector rates. An added benefit of studying the private sector was that other potentially complicating factors like variations in the scope of bargaining were largely inapplicable due to the prevalence of uniform federal labor laws.

It was shown using CPS data from 2000 through 2014 that the private-sector union membership rate averaged 93% in "agency fee" states and 84% in right-to-work states.[7] At the *Friedrichs* merit stage, we then performed a similar investigation in the public-sector by utilizing the raw CPS data to determine the unionization membership rates for state and local public-sector employees for the only eight states that had, over that same period, mandated exclusive representation, imposed a duty of fair representation, guaranteed a right to work, and maintained a broad and

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[6] But see, 29 U.S.C. § 164(b) (allowing right to work under NLRA) with 45 U.S.C. § 452 Eleventh (prohibiting right to work under Railway Labor Act).

[7] http://www.scotusblog.com/wp-content/uploads/2015/10/14-915-tsac-Mackinac-Ctr.pdf at pp. 11-14 and Table D. Today, Kentucky, Missouri, West Virginia, and Wisconsin would be moved from the category of "Agency-Fee States" to "Mixed-Status States," since all have become private-sector right-to-work states since 2014. Ky. Rev. Stat. § 336.130(3); Mo. Rev. Stat. § 290.590(2) (suspended pending 2018 referendum); W. Va. Code § 21-5G-2; and Wis. Stat. § 111.04(2).

stable scope of mandatory bargaining subjects. These states were Florida, Idaho, Iowa, Kansas, Nebraska, Nevada, North Dakota, and South Dakota. Public-sector union membership rates in these states were in the high 70s from 2000 to 2007 and in the low 80s from 2008 to 2014, largely mirroring private-sector right-to-work numbers.[8] Interestingly, they also mirrored the railway union membership percentage in 1950, around the time that the Railway Labor Act was amended to permit agency fees. *Communications Workers of America v. Beck*, 487 U.S. 735, 750 (1988) ("75 to 80% of the 1.2 million railroad industry workers belonged to one or another of the railway unions," citing H.R.Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950)).

1. Critiques of the CPS methodology

Amicus Curiae's *Friedrichs* briefs were the subject of both an opposing amicus brief and a briefing paper. The opposing *Friedrichs* brief[9] was submitted by three academics who preferred the Schools and Staffing Survey (SASS), an elementary and secondary education survey administered by the US Department of Education's National Center for Education Statistics. They

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[8] http://www.scotusblog.com/wp-content/uploads/2015/10/14-915-tsac-Mackinac-Ctr.pdf at pp. 31-38 and Table D. Today, Iowa would be excluded, since it placed many limits on public-sector bargaining. See generally, Iowa House File 291 (passed February 17, 2017).

[9] http://www.scotusblog.com/wp-content/uploads/2015/11/14-915_amicus_resp_SocialScientists.authcheckdam.pdf.

indicate the "free-rider rate"[10] for public school staff in states similar to the eight states examined under the Mackinac Center's CPS custom cuts of 34%, which translates into a 66% union membership rate.[11] This result is lower than our 80% using the CPS methodology.

The briefing paper[12] generally recognized the primacy of the CPS in determining union membership rates. But the paper asserted that the results gathered regarding public-sector unionism "call into question the reliability of CPS data."[13] Noting that under SASS the data shows a union membership rate of 60%-65% where there is both mandatory bargaining and right to work compared to the CPS's 75%-80%, the author stated "these data discrepancies are not easily resolved. While this [briefing] paper relies on the CPS, it

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[10] In right-to-work states, the union-membership rate and the free-rider rate add to 100%. In agency fee situations, the union-membership rate will indicate what percentage declined membership in the union, while the free-rider rate will always be zero since everyone at least pays agency fees.

[11] http://www.scotusblog.com/wp-content/uploads/2015/11/14-915_amicus_resp_SocialScientists.authcheckdam.pdf at p. 23.

[12] Jeffrey H. Keefe, On *Friedrichs v. California Teachers Association*: The inextricable links between exclusive representation, agency fees, and the duty of fair representation, Economic Policy Institute Briefing Paper #411 (Nov. 2, 2015), http://www.epi.org/files/pdf/94942.pdf.

[13] *Id.* at 6.

should be recognized that these data may systematically understate the extent of free-riding in RTW states in the public sector."[14]

C. The payroll-deduction methodology

Amicus Curiae then developed an alternative methodology for examining public-sector union membership rates on a grand scale. In doing so, we recognized that the unions themselves would be the best source of data. Generally, however, unions do not have to provide information like the number of workers covered by their collective bargaining contracts. Even where a union has to file a federal government LM-2 form,[15] that form's membership section (13) only discusses members and fee payers, which does not provide the necessary data in states with mandatory public-sector bargaining and a right-to-work law.[16]

Thus, since there were questions about the information provided by the employees themselves in the CPS, and since the unions were not subject to uniform reporting requirements with the necessary data, we turned to the employers. Public employers typically allow workers to deduct union dues and agency fees from their paychecks, and public employers also know

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[14] *Id.* at 7.

[15] The LM-2 is an annual financial report that labor organizations are required to file with the U.S. Office of Labor Management Standards. See generally, 29 C.F.R. § 403.2.

[16] https://www.dol.gov/olms/regs/compliance/GPEA_Forms/LM2_Instructions_6-2016_techrev.pdf.

how many of their employees are covered by a collective bargaining agreement. These numbers can be used together to calculate a union membership floor. The result is a lower-bound estimate on the union-membership rate since other members might pay their union dues by cash, check, or credit card. Furthermore, while states may allow payroll deductions, there is no guarantee that those deductions will become part of every collective bargaining agreement. In addition, some states require an employee to provide affirmative consent before any deductions are made. A union member who does not provide such consent would not show up as a member.

But there are thousands – if not tens of thousands – of public employers in the United States. The analysis was therefore restricted to state employees, allowing a large yet manageable data set and state-by-state comparisons. State university systems, however, were excluded, because gathering the figures for every state university in the country would have been prohibitively difficult.

States were sorted into five categories:

(1) mandatory bargaining and agency fees (22 states);

(2) mandatory bargaining and right-to-work provisions (8 states);

(3) mandatory bargaining, no agency fees, and dues deductions prohibited (just Wisconsin);

(4) no mandatory bargaining but dues deductions allowed (17 states); and

(5) no mandatory bargaining and dues deductions prohibited (2 states).[17]

For purposes of comparison, we ran custom cuts of the raw CPS data for state government employees for 2015. Note, however, that these figures, do not provide a perfect apples-to-apples comparison, because the CPS custom cuts include state university employees and the payroll-deduction figures do not.

For each of the five categories of states below, the CPS figures will be followed by the payroll-deduction methodology numbers.

[17] The specific state-by-state data sources for each state's payroll-deduction numbers and the statutory support for the bargaining and payroll deduction laws are detailed in full in the forthcoming Chicago Legal Forum paper.

1. Mandatory bargaining and agency fees

With Mandatory bargaining, agency fees and dues collection	CPS Total Employment	CPS Coverage	CPS Union Members	CPS Covered Non-Members	CPS Membership rate
Alaska	35,856	18,091	16,794	1,297	92.8%
California	807,020	399,492	374,643	24,849	93.8%
Connecticut	80,863	47,647	47,647	0	100.0%
Delaware	45,129	15,525	14,459	1,066	93.1%
Hawaii	78,313	42,688	42,037	651	98.5%
Illinois	262,982	127,951	122,373	5,578	95.6%
Maine	23,511	14,919	10,967	3,952	73.5%
Maryland	129,315	32,593	28,375	4,218	87.1%
Massachusetts	133,596	72,617	71,014	1,603	97.8%
Minnesota	130,476	54,323	54,323	0	100.0%
Missouri	157,849	30,547	23,798	6,749	77.9%
Montana	38,258	12,952	11,642	1,310	89.9%
New Hampshire	26,810	12,354	10,852	1,502	87.8%
New Jersey	163,114	88,117	80,504	7,613	91.4%
New Mexico	77,121	15,202	11,938	3,264	78.5%
New York	368,874	230,740	227,556	3,184	98.6%
Ohio	191,251	53,635	50,416	3,219	94.0%
Oregon	110,593	53,688	49,166	4,522	91.6%
Pennsylvania	205,135	117,687	109,723	7,964	93.2%
Rhode Island	23,882	14,255	13,623	632	95.6%
Vermont	20,856	11,277	10,342	935	91.7%
Washington	212,[illegible]	116,572	113,207	3,365	97.1%
Total	**3,32[illegible]**	**1,582,872**	**1,495,399**	**87,473**	**94.5%**

Source: Mackinac Center

With Mandatory bargaining, agency fees and dues collection	Payroll Total Employment	Payroll Coverage	Payroll Union Members	Payroll Covered nonMembers	Payroll Membership rate
Alaska	15,127	13,871	13,871	0	100.0%
California	204,470	172,508	125,059	47,449	72.5%
Connecticut	68,288	52,231	42,968	9,263	82.3%
Delaware	43,587	20,118	20,694	(576)	102.9%
Hawaii	49,265	45,021	45,021	0	100.0%
Illinois	112,677	67,046	62,888	4,158	93.8%
Maine	11,673	9,932	7,126	2,806	71.7%
Maryland	46,442	28,621	28,621	0	100.0%
Massachusetts	43,899	39,088	37,095	1,993	94.9%
Minnesota	43,769	38,042	28,564	9,478	75.1%
Missouri	50,317	21,234	4,286	16,948	20.2%
Montana	12,807	7,207	7,207	0	100.0%
New Hampshire	10,086	8,477	5,094	3,383	60.1%
New Jersey	71,352	59,830	48,133	11,697	80.4%
New Mexico	17,125	9,436	5,047	4,389	53.5%
New York	251,927	233,944	196,907	37,037	84.2%
Ohio	52,947	35,402	31,964	3,438	90.3%
Oregon	36,767	30,332	18,423	11,909	60.7%
Pennsylvania	72,622	66,512	50,913	15,599	76.5%
Rhode Island	15,101	11,401	8,733	2,668	76.6%
Vermont	8,669	7,488	5,727	1,761	76.5%
Washington	62,419	46,502	25,043	21,459	53.9%
Total	**1,301,336**	**1,024,243**	**819,384**	**204,859**	**80.0%**

Source: Mackinac Center

Before comparing the two sets of data for these Category 1 states, we note that the payroll-deduction methodology estimates for Alaska, Delaware, Hawaii, and Maryland appear questionable, since they all meet or exceed 100% despite being a supposed floor on the states' union membership rate. In Delaware, with an estimate of 102.9%, the problem is a simple data tracking error.[18] In Hawaii, with a payroll-deduction rate of 100%, state law mandates that all public employee paychecks be subject to payroll deductions equivalent to full union dues, even if the employees are agency-fee payers.[19] In Alaska and Maryland, both with payroll-deduction rates of 100%, the problem appears to be errors in the data provided.

The difference between the union membership rates for Category 1 states is around 15 percentage points on average. The average CPS union membership rates are at 94.5%, while the average rate using the payroll-deduction method – which generally operates as a membership floor – is 80%. The two sets of

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[18] Delaware's payroll numbers were obtained in an email. Email from Brenda Lakeman, Dir. of Human Res. Mgmt. and Statewide Benefits at the Delaware Office of Mgmt. and Budget, to Justin A. Davis (Dec. 23, 2016, 02:03 EST) (on file with the undersigned).

Ms. Lakeman explained: "The reason that the employees with a Union deduction is higher than those appearing covered [by a collective bargaining agreement] is that many School job records do NOT show the union code, but yet the employees are correctly set up to have the DSEA deduction taken."

[19] Hawaii makes any agency-fee payer seek a rebate outside the payroll-deduction process. Haw. Rev. Stat. § 89-4.

figures are somewhat different, but they are not inconsistent with each other, and the difference, while perhaps greater than a census statistician would prefer, is not particularly large.

2. Mandatory bargaining and no agency fees

Mandatory bargaining, no agency fees and dues collection	CPS Total Employment	CPS Coverage	CPS Union Members	CPS Covered Non-Members	CPS Membership rate
Colorado	133,653	14,948	14,097	851	94.3%
Florida	269,024	53,999	43,239	10,760	80.1%
Iowa	139,103	41,217	28,252	12,965	68.5%
Kansas	95,445	22,064	16,420	5,644	74.4%
Michigan	204,104	96,957	89,958	6,999	92.8%
Nebraska	44,919	9,987	7,959	2,028	79.7%
North Dakota	25,578	2,847	2,212	635	77.7%
South Dakota	23,437	3,533	2,220	1,313	62.8%
Total	**935,263**	**245,552**	**204,357**	**41,195**	**83.2%**

Source: Mackinac Center

Mandatory bargaining, no agency fees and dues collection	Payroll Total Employment	Payroll Coverage	Payroll Union Members	Payroll Covered nonMembers	Payroll Membership rate
Colorado	40,464	31,447	1,745	29,702	5.5%
Florida	114,887	74,266	7,689	66,577	10.4%
Iowa	19,311	15,302	7,829	7,473	51.2%
Kansas	19,738	9,649	1,629	8,020	16.9%
Michigan	49,334	34,846	29,472	5,374	84.6%
Nebraska	17,952	10,247	1,573	8,674	15.4%
North Dakota	7,201	414	414	0	100.0%
South Dakota	13,000	0	0	0	N/A
Total	**281,887**	**176,171**	**50,351**	**125,820**	**28.6%**

Source: Mackinac Center

In contrast to the figures for the Category 1 states, the difference between the union-membership rates calculated for Category 2 states is substantial – more than 50 percentage points, with the CPS-based rates at 83.2% and the payroll-deduction method at 28.6%. While the two numbers are technically consistent with each other, since the 28.6% payroll-deduction methodology figure is a floor, it seems unlikely that the gap should be this large absent problems with the data. This concern will be discussed more fully below, particularly since Category 2 – essentially mandatory bargaining with right-to-work laws – represents the remedy being sought in the instant case.

3. Mandatory bargaining, no agency fees, no dues collection

Mandatory bargaining, no agency fees, no dues collection	CPS Total Employment	CPS Coverage	CPS Union Members	CPS Covered Non-Members	CPS membership rate
Wisconsin	165,813	37,334	26,535	10,799	71.1%

Source: Mackinac Center

Mandatory bargaining, no agency fees, no dues collection	Payroll Total Employment	Payroll Coverage	Payroll Union Members	Payroll Covered nonMembers	Payroll Membership rate
Wisconsin	33,321	408	333	75	81.6%

Source: Mackinac Center

Wisconsin is the only state in Category 3, and its constellation of collective bargaining statutes is unique. This distinctiveness prevents it from providing much guidance nationally.

4. No mandatory bargaining and voluntary dues collection

No mandatory bargaining and voluntary dues collection	CPS Total Employment	CPS Coverage	CPS Union Members	CPS Covered Non-Members	CPS Membership rate
Arizona	151,190	17,438	11,546	5,892	66.2%
Arkansas	119,672	16,062	11,799	4,263	73.5%
Idaho	63,568	9,365	9,151	214	97.7%
Indiana	140,110	33,600	25,473	8,127	75.8%
Kentucky	154,346	26,996	23,762	3,234	88.0%
Louisiana	120,364	18,515	14,320	4,195	77.3%
Mississippi	141,013	12,262	10,474	1,788	85.4%
Nevada	53,580	10,728	8,331	2,397	77.7%
North Carolina	306,462	37,106	25,358	11,748	68.3%
Oklahoma	139,222	25,609	17,103	8,506	66.8%
South Carolina	161,059	17,913	11,595	6,318	64.7%
Tennessee	120,937	29,234	24,467	4,767	83.7%
Texas	616,332	93,282	75,592	17,690	81.0%
Utah	91,323	9,104	6,653	2,451	73.1%
Virginia	182,931	20,553	16,342	4,211	79.5%
West Virginia	59,590	12,403	10,369	2,034	83.6%
Wyoming	26,017	2,684	2,048	636	76.3%
Total	**2,647,716**	**392,854**	**304,383**	**88,471**	**77.5%**

Source: Mackinac Center

No mandatory bargaining and voluntary dues collection	Payroll Total Employment	Payroll Coverage	Payroll Union Members	Payroll Covered nonMembers	Payroll Membership rate
Arizona	37,714	0	4,246	N/A	N/A
Arkansas	25,314	0	11,683	N/A	N/A
Idaho	10,750	0	374	N/A	N/A
Indiana	28,095	0	203	N/A	N/A
Kentucky	Not Obtained	0	Not Obtained	N/A	N/A
Louisiana	37,196	0	4,342	N/A	N/A
Mississippi	31,030	0	1,258	N/A	N/A
Nevada	19,499	0	2,944	N/A	N/A
North Carolina	85,000	0	38,442	N/A	N/A
Oklahoma	33,859	0	Not Obtained	N/A	N/A
South Carolina	30,671	0	Not Obtained	N/A	N/A
Tennessee	42,857	0	11,798	N/A	N/A
Texas	150,904	0	32,042	N/A	N/A
Utah	21,587	0	657	N/A	N/A
Virginia	126,781	0	11,213	N/A	N/A
West Virginia	49,754	0	3,303	N/A	N/A
Wyoming	8,249	0	Not Obtained	N/A	N/A
Total	**739,260**	**0**	**122,505**	**N/A**	**N/A**

Source: Mackinac Center

Among the Category 4 states, the difference between the two methods of calculating union-membership rates is again pronounced, as in Category 2. Because the laws in these states do not permit mandatory collective bargaining for state government employees, we inevitably find in the payroll-deduction methodology that the number of state employees covered by collective bargaining agreements is zero. The CPS, however, finds that thousands and even tens of thousands of state government employees in these states are covered by collective bargaining agreements for which there is no statutory authority.

Further, there is a considerable difference between the total number of state government employees recorded under the two methods. Part of this difference can be explained by CPS's inclusion of state university employees (who are not counted in the payroll-deduction approach). Nevertheless, the presence of state university employees in the CPS figures is very unlikely to explain why, for instance, CPS's total reported state government employment in Arizona, Arkansas, and Texas is more than four times the figures reported to us by Arizona, Arkansas, and Texas state officials for nonuniversity state government employees.

We will return again to the CPS figures and methodology below.

5. No mandatory bargaining and limits or bans on state-assisted dues collections

No mandatory bargaining and ban state-assisted dues collection	CPS Total Employment	CPS Coverage	CPS Union Members	CPS Covered Non-Members	CPS Membership rate
Alabama	99,378	27,860	25,334	2,526	90.9%
Georgia	185,574	19,980	17,308	2,672	86.6%
Total	284,952	47,840	42,642	5,198	89.1%

Source: Mackinac Center

mackinac.org [LOGO]

No mandatory bargaining and ban state-assisted dues collection	Payroll Total Employment	Payroll Coverage	Payroll Union Members	Payroll Covered nonMembers	Payroll Membership rate
Alabama	33,834	0	0	0	N/A
Georgia	56,961	0	0	0	N/A
Total	90,795	0	0	0	N/A

Source: Mackinac Center

mackinac.org [LOGO]

In Category 5, which includes just Alabama and Georgia, the differences in the results between the two approaches are similar to those seen in Category 4. The CPS reports tens of thousands of state government employees covered by collective bargaining agreements for which there is no statutory authority. Moreover, the CPS again finds much higher levels of total state government employment than would be expected.

D. Briefly assessing the CPS data and union membership rates

The CPS has been accurately described as "the principal data source from which researchers compile and obtain information on union membership and coverage for states, metropolitan areas, industries, and occupations."[20] It is worth observing that the CPS figures do have some face validity. For instance, when in *Friedrichs* we considered the eight states from 2000 to 2014 that had mandatory collective bargaining, right-to-work laws, and a broad range of mandatory bargaining subjects, our CPS-based union-membership rate of 80% was far closer to the SASS membership rate (66%) calculated by the opposing amicus brief in *Friedrichs* and to the union membership rate occurring when the Railway Labor Act was amended (75%-80%) than either of those estimates is to the payroll-deduction

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[20] Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note, 56 No. 2* Industrial and Labor Relations Review 1 (2003).

figure of 28.6% for Category 2 states. In other words, it is not clear that the CPS is irredeemably flawed.

Yet as seen above, there are reasons for concern over the CPS estimates, particularly for states in Categories 2, 4, and 5.

While it is beyond the scope of this brief to determine definitively where a problem with the CPS methodology lies, it is worth noting that the definitions in the Basic CPS Questionnaire[21] are not clear. In particular, the CPS has two questions about a respondent's potential relationship to a labor union:

ERNLAB

On this job, (are/is) (name/you) a member of a labor union or of an employee association similar to a union?

1. Yes
2. No

ERNCOV

On this job, (are/is) (name/you) covered by a union or employee association contract?

1. Yes
2. No

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[21] Bureau of Labor Statistics, Basic CPS Items Booklet, http://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Labor%20Force.pdf [https://perma.cc/HPM8-7A6C].

Part B, Chapter 5.C, of the CPS Interviewing Manual discusses "Union Membership and Coverage Concepts":

> [Y]ou ask about labor union or employee association membership on the person's sole or main job. Select "yes" for these questions if the person is a member of a labor union or an association that serves as a collective bargaining representative for the person.
>
> You will ask persons who are not members of a union or employee association whether or not (s)he is covered by a union or employee association contract at their sole or main job. **Covered** means: there is a contract between their employer and a union or association that affects the wages, working conditions, and/or benefits at the job.[22] [Emphasis in original.]

Given this explanatory language, a good argument can be made that the CPS intends a respondent to be considered a union member or an employee covered by a union contract *only* when there is a union acting as an exclusive bargaining agent and formally engaged in mandatory collective bargaining over the terms and conditions of the respondent's employment. We adopted this definition in determining our payroll-deduction methodology figures.

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[22] U.S. Census Bureau, Current Population Survey Interviewing Manual (June 2013), Page B5-4, https://www.census.gov/prod/techdoc/cps/CPS_Manual_June2013.pdf [https://perma.cc/ZGY3-LXBX].

But one could counter that situations where unions participate either formally or informally in non-mandatory bargaining would satisfy the coverage definition and membership definitions described above as well. This reading would lead to more respondents being counted as union members and as employees covered by a collective bargaining agreement, and it could explain why CPS figures tend to be higher.

E. Union viability, state interest, and constitutional standards in light of the data

But, resolving the CPS dilemma is not necessary in order to determine the constitutional question.

The *Harris* dissenters asserted that agency fees were necessary to adequately fund unions and provide the state with viable collective bargaining partners. Amicus Curiae's CPS-based calculations in *Friedrichs* indicated that agency fees were not necessary to adequately fund unions because state and local public-sector employees maintained a union membership rate of 80% in right-to-work environments. Such unions would presumably be viable bargaining partners no matter how the *Harris* minority might define viability.

Our payroll-deduction figures suggest a different environment, however. Under the payroll-deduction methodology, there are states like Florida, which has a lower-bound of just 10.5% for its state-employee union membership rate – the second-lowest figure among Category 2 states.

Yet Florida is hardly without public-sector unions. The Florida state employees' union representing the most workers is Florida Public Employees Council 79 of the American Federation of State, County and Municipal Employees (AFSCME). In 2015, AFSCME Council 79 represented 47,653 state employees in its collective bargaining, and 1,369 of those employees had their dues withdrawn by the state.[23] It is unclear whether Council 79 also had local-employee members, but all of its LM-2s from 2000 to 2014 indicated more than 13,000 members.[24] This membership purportedly dropped to zero in 2015 and 2016 according to the union's LM-2s, but these figures are belied by the union's maintaining a fiscal 2016-2017 Master Agreement with the state of Florida for four bargaining units.[25] Further, the certification of one of those four units occurred in 1976; two in 1978; and one in 1981.[26]

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[23] The payroll numbers were obtained via email. Email from James J. Parry, Assistant General Counsel, Florida Dep't Mgmt. Serv., to Patrick J. Wright (Sept. 13, 2016, 03:53 EST) (on file with author).

[24] LM-2s can be found at http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm. On that page, click on "union search." The file number for this union is 513-362. The next page that appears will be a "Result Set" page. Click on the entry under "Affiliation/Organization Name" and the LM-2s from 2000 to 2017 will appear.

[25] http://www.dms.myflorida.com/content/download/128685/800846/AFSCME_FY_2016-17_SIGNED_AGREEMENT_for_distribution_andposting-08-23-16.pdf.

[26] http://www.dms.myflorida.com/content/download/128685/800846/AFSCME_FY_2016-17_SIGNED_AGREEMENT_for_distribution_andposting-08-23-16.pdf at p. 2.

Thus, this union has been able to serve as an exclusive bargaining agent for tens of thousands of workers for around four decades without an agency fee. Nor is Council 79 unique. Florida's second-largest union was Teamsters Local Union No. 2011, which represented 17,909 state employees, 4,436 of whom paid dues through payroll deductions.[27] Local 2011's LM-2 showed 4,456 members.[28]

The Master Agreement between Florida and Teamsters Local Union No. 2011 indicates that union was certified in 2011, but this same collective bargaining unit has been represented by one union or another since 1985.[29] In other words, this unit has not only had representation for over 32 years, but two unions have competed to represent the unit, again in the absence of agency fees.

And consider Colorado, whose lower-bound public-sector union estimate was, at 5.5%, even lower than Florida's. The eight units represented by the union Colorado Wins were all certified in 2008, the year after

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[27] Parry email to Wright, supra note 23.

[28] 2015 LM-2 of Teamsters Local 2011 (File No. 544-872) at Schedule 13.

[29] http://www.dms.myflorida.com/content/download/86949/497952/SSU_FY_2015-16_Agreement.pdf. Note that in December 2016, the Police Benevolent Association became the new certified bargaining agent for this unit as a result of an election. As a result, the union represented the second largest collective bargaining unit in Florida. The Police Benevolent Association had previously represented these units from 1985 to 2011. Florida Public Employment Relations Commission Certifications 1902, 1779, and 667.

state-employee collective bargaining became legal in Colorado.[30] Colorado Wins did not file an LM-2; however, it is representing a 31,000-member collective bargaining unit and has done so for nearly a decade despite the absence of agency fees.

At oral argument in *Friedrichs*, counsel for the unions and the State of California repeatedly forwent direct requests from the Justices to discuss facts surrounding union viability.[31] Further, with Florida and Colorado, there is no simple explanation why under our payroll-deduction method their lower-bound union-membership rates would be so low, while Iowa, which was until very recently also in Category 2, has a lower-bound union-membership rate slightly over 50%.[32] Perhaps, for instance, Florida state law has reduced the appeal of public-sector union membership by effectively giving the Legislature carte blanche power to resolve collective bargaining impasses between the governor and the state's public-sector unions.[33] Or perhaps, in turn, the disparity between these states is

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[30] Colo. Exec. Order No. D 028 07 (Nov. 2, 2007).

[31] Transcript of Oral Argument at 50-52, 56-63, 71-72, and 79-80, *Friedrichs*, 136 S. Ct. 1083 (2016) (No. 14-915).

[32] Michigan's 84.6% union-membership rate under the payroll method is traceable to its long history as an agency fee state, a history that only clearly ended in 2015. See generally, *United Auto Workers v. Green*, 870 N.W.2d 867, 876 (Mich. 2015). Also note that Iowa's recent public-sector bargaining statutory changes will likely affect this number relatively soon.

[33] In an impasse, "the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues." Fla. Stat. § 447.403(d).

better explained by other policy, cultural, economic, and historical influences. As a practical matter, then, it is difficult to determine what "adequate funding" might be from state to state.

The *Harris* minority also referred to the need for "viable" exclusive representative bargaining partners. The examples discussed above suggest viability – or at least a capacity to represent large numbers of workers over many years – does not require agency fees. This conclusion is further bolstered by the experience of two states in Category 4: North Carolina and Arkansas. In both states, more than 40% of all state employees pay union dues voluntarily to a union that is *not* an exclusive bargaining agent – in other words, to a union that lacks both monopoly power and mandatory subjects of bargaining.[34]

Such levels of truly voluntary support are difficult to reconcile with the *Harris* dissenters' views regarding union viability. But, as in Category 2, the states within Category 4 have divergent rates of voluntary union contribution. Many state-specific factors may explain this disparity, but it may simply be that some unions are better able to articulate a vision in line with

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[34] Note too, that these 40% figures are not "union-membership rates" as defined in this paper; rather they represent voluntary contributors divided by total state employees. In contrast the union-membership rate for states in Categories 1, 2, and 3 is union members divided by the total number of state employees *covered by a collective bargaining agreement* (obviously less than total state employees).

their potential members' desires, and these unions thrive regardless of an agency fee.

Ultimately, for this Court to maintain the constitutionality of agency fees and their resulting impositions on unionized public employees' First Amendment rights, it would have to determine why the unions described in this section – all of which lacked agency fees – are not "adequately funded" or "viable" exclusive representative bargaining partners. Indeed, this Court would need to explain how unions that have repeatedly provided state governments with exclusive representative bargaining partners and repeatedly negotiated and entered into important state collective bargaining agreements have failed to satisfy the state's interest in having a viable, exclusive bargaining partner. Given the variables that shape the nation's public-sector labor markets, it is difficult to see how this Court could provide a cogent standard of adequate funding and union viability that would withstand exacting scrutiny.

CONCLUSION

This Court should grant certiorari and overturn *Abood*.

Respectfully submitted,

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